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Cause No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

ALAN LOUIS CHAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES TENTH CIRCUIT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

January 3, 2007

Alan Louis Chavis, (Pro Se)
Federal Register #26139-080
F.C.I. SEA. P.O. Box 9000
Seagoville, Texas 75159-9000
Telephone No. Not Available

QUESTIONS PRESENTED

1) Whether the district court committed reversible error in denying Petitioner's Sixth Amendment right to "counsel of choice", when the trial court, over Petitioner's objections, allowed Petitioner's hired, paid and preferred co-counsel of choice to withdraw and replaced preferred co-counsel with court-appointed "stand by" counsel, which was a substantially lesser degree of representation than Petitioner desired and requested?

2) Whether the district court committed reversible error and violated Petitioner's right to a fair trial, refusing Petitioner the defense of his choice by denying a "good faith" instruction, and in any event, whether the appellate decision conflicts with it's own prior precedent; United States v. Hopkins, 744 F.2d 716 (10th Cir. 1984) (en banc), with regard to good faith instruction?

PARTIES TO THE PROCEEDINGS

Petitioner is Alan Louis Chavis, pro se, Federal Register No. 26139-080, a prisoner in custody at the Federal Correctional Institution, 2113 North Hwy. 175, Seagoville, Texas 75159-9000.

Respondent is the United States of America, represented by the Office of the Solicitor General of the United States, Department of Justice, 950 Pennsylvania Avenue N.W, Room 5614, Washington, D.C. 20530-0001.

All parties to the proceedings are listed in the caption of this petition, there are no other interested parties; Supreme Court Rule 14.1(b).

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JURISDICTION

The date on which the United States Tenth Circuit Court of Appeals decided my case was August 29, 2006.

A timely petition for rehearing, en banc, was filed on September 12, 2006, a copy of the Order, dated October 4, 2006, denying rehearing appears at APPENDIX "B" to the petition.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254 (1); Supreme Court Rule 14.1(e).

OPINIONS BELOW

The opinion of the United States Tenth Circuit Court of Appeals in United States v. Chavis, C.A. No. 05-6001, August 29, 2006, appears at APPENDIX "A" to the petition, and is Reported at 461 F.3d 1201 (10th Cir. 2006); Supreme Court Rule 14.1(d).

CONSTITUTIONAL PROVISIONS INVOLVED

Issue 1: Right to Counsel of Choice

The denial of counsel of choice violates the Sixth Amendment of the United States Federal Constitution, which provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense;" U.S.C.A. Sixth Amendment.

Issue 2: Right to Fair Trial

The denial of a right to fair trial violates: 1) the Sixth Amendment above; and 2) the Due Process Clause of the Fifth Amendment. Federal Courts interpret the Due Process Clause of the Fourteenth Amendment to be equally inherent in the Fifth Amendment with respect to Federal Constitutional Rights. The Fourteenth Amendment, Section 1, provides that:

"All persons born or naturalized on the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws"; U.S.C.A. Fourteenth Amendment.

Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

A. Summary of the Charges

A criminal complaint was filed against Petitioner in the United States Western District of Oklahoma Court on December 11, 2003. Petitioner was arrested, held without bail, and subsequently indicted on January 20, 2004; United States v. Chavis, CR-04-009-M. A superseding indictment was filed on February 18, 2004.

A superseding information was filed on March 26, 2004, and a second superseding indictment was filed on August 3, 2004 charging Petitioner with conspiracy to commit an offense or to defraud the United States, in violation of 18 U.S.C. § 371; and with multiple counts of mail fraud; aiding and abetting, in violation of 18 U.S.C. §§ 1341 and 2.

B. Summary of The Case

On December 24, 2003, the Court appointed Ms. June Tyhurst, Assistant Federal Public Defender, to represent Petitioner. On December 31, 2003, Petitioner filed a waiver of counsel and announced his desire to proceed pro se. On January 6, 2004, Petitioner renewed his request to proceed pro se, which the Court granted and excused Attorney Tyhurst from further representing Petitioner.

On January 28, 2004, the government filed a Motion For Hearing To Determine Pro Se Representation. On February 5, 2004, the Court held a hearing concerning the pro se representation and again appointed Attorney Tyhurst, but this time the appointment was in the capacity of "co-counsel." On February 10, 2004, the Court held a "follow-up hearing" on the previous representation hearing, and changed the capacity of Attorney Tyhurst's representation from co-counsel to stand-by counsel.

Petitioner desired co-counsel, not stand by counsel. Petitioner, therefore hired his own co-counsel; on June 16, 2004, Attorney Gary L. Cantrell entered his appearance as Petitioner's co-counsel, and Attorney Tyhurst filed a Motion To Withdraw as Petitioner's attorney. On June 17, 2004, the Court granted Attorney Tyhurst's Motion To Withdraw.

On July 13, 2004, Attorney Cantrell, after being paid six thousand dollars, $6,000.00, filed a motion to withdraw as Petitioner's co-counsel; he was dissatisfied because he wanted an extension of time to review discovery materials. Petitioner insisted on pursuit of his speedy trial rights as an intricate part of his trial strategy and, therefore, refused to consent to a defendant's motion for extension of time. On July 19, 2004, without

Petitioner's consent, Attorney Cantrell filed a motion to continue hearing on Motion To Withdraw as co-counsel.

On July 20, 2004, the Court granted Attorney Cantrell's motion to continue, and set a hearing date on August 2, 2004, at which time the Court granted the government's oral motion to continue from the August to the September docket. The Court ultimately granted the extension, which was the stated reason for Attorney Cantrell's Motion To Withdraw, and then allowed Cantrell to withdraw anyway.

The Court, again, appointed Attorney Tyhurst in the capacity of "stand-by" counsel, which is a lesser degree of representation than Petitioner desired, and to which Petitioner stringently objected; APPENDIX "C" to the petition. Because Petitioner's pre-trial detention facility provided absolutely no access to a law library, co-counsel was essential and stand-by counsel was grossly inadequate. A trial by jury was held on September 13 through 17, 2004. The jury found Petitioner guilty of counts 1 through 12. Sentencing was held on December 10, 2004, Petitioner was sentenced to a term of imprisonment of 292 months; 60 months as to count 1, and 232 months as to counts 2 through 12, with all terms to run concurrently with each other.

Judgment of the District Court was entered on December 16, 2004. A timely notice of appeal was filed on December 22, 2004. Petitioner hired Attorney Bill Zuhdi to perfect an appeal; Attorney Zuhdi filed entry of appearance on December 31, 2004 and Attorney Tyhurst filed a Motion To Withdraw on January 3, 2005, which was granted on January 4, 2005.

An appeal was filed with the United States Tenth Circuit Court of Appeals on December 21, 2005. On August 29, 2006, the Court of Appeals affirmed the decision of the District Court. Petitioner filed a timely petition for rehearing on September 12, 2006, which was denied on October 4, 2006.

C. Summary Of The Facts

Petitioner founded and operated "Louis Allen and Company," a legitimate business that recruited home workers who earned, as promised, the weekly incomes guaranteed and were additionally paid, as promised, weekly bonus checks, $225 hiring bonuses, etc. Petitioner genuinely believed his operation was lawful and that he was helping workers make an honest living.

The business operated for approximately 2 ½ years and grew to over 700 home workers, not victims, who were receiving regular weekly checks from the company, as

attested by P.I. Caver in his affidavit to obtain the criminal complaint on December 11,2003; "[t]here were over 700 active home workers who were receiving regular weekly checks from the company."

Evidence of multiple factors including; 1) regular weekly earnings of home workers; 2) weekly bonus checks paid to home workers; 3) training program established for home workers; 4) testimonial letters from active home workers; 5) the fact that requested reimbursements were paid to workers; and 6) the fact that an unconditional money back guarantee existed and was available to all employees, contributed to Petitioner's genuine good faith belief that he was operating in a lawful manner, all of which was evidenced at trial; APPENDIX "D" to the petition.

The fact that regular weekly payments were made to workers was evidenced in the testimony of P.I. Caver in the Criminal Complaint, December 2003, and in APPENDIX "D" to the petition. The company and Petitioner, possessed numerous (between 200 and 300) testimonial letters written by satisfied home workers praising the business and expressing satisfaction.

The Postal Inspectors confiscated the testimonial letters, which were exculpatory evidence that belonged to

Petitioner, and all but 12 were never returned to Petitioner for use in his defense. When asked to return the remaining exculpatory evidence, they claimed the 12 letters were all they had; APPENDIX "D" to the petition.

All active home workers who successfully completed the requisite training program and followed the company's directions earned weekly bonus checks in addition to the promised per stuffed envelope amount; APPENDIX "D" to the petition. Further, as evidenced by the record above, an unconditional money back guarantee was available to all home workers and all requested refunds were made.

Weekly bonus checks were issued, $225 hiring bonuses were regularly mailed out to home workers; APPENDIX "D" to the petition. Every promise made to every worker was honored and all requested reimbursements were made. Petitioner established an active "Hotline Help line" for the assistance and information of all home workers, consisting of those who were still in training and those who were already working. Petitioner provided whatever assistance and encouragement they required; APPENDIX "D" to the petition. Unlimited free postage stamps were provided to home workers, as

needed and requested; APPENDIX "D" to the petition.

The text of the letter that Petitioner sent to every supervisor at which time they were hired or promoted, provided instructions, interaction t resolve all disputes in favor of the worker; see Trial Transcript, p. 210-211, APPENDIX "D" to the petition.

This letter to all supervisors was followed-up by a phone call to make sure they understood the company's policy and agreed to the instructions contained therein; APPENDIX "D" to the petition. All of the above hardly leads one to the conclusion that the home worker employees were "victims," but rather that Petitioner went to great lengths to ensure their satisfaction, proper training, and continued employment. The referenced trial transcripts pinpoint evidence that Petitioner acted in good faith.

In April 2003, despite the fact that this case was only in the investigative stage, ten postal inspectors broke into Petitioner's Akron Alabama offices and confiscated everything, including office furniture. No charges had been filed, yet they also went to the banks where the business kept the gross receipts and actually confiscated the money in those accounts. They did not freeze the accounts pending the outcome of the investigation, but rather

actually took the money leaving approximately $50,000.00 in refund, bonus and reimbursement checks, which had already been sent out to be returned to the banks. The business was still subject to all obligations to the hundreds to active home workers and to payment of all checks already sent out, but had literally been looted by the inspectors.

Petitioner was arrested in December 2003, and HELD WITHOUT BAIL. All money was confiscated from his personal accounts while Petitioner was being held in pre-trial detention. Petitioner had two choices; accept an overworked public defender, or defend himself. Petitioner believed that once a jury saw the truth and he was acting in good faith and genuinely believed all his business operations were lawful, the jury would surely acquit. Petitioner was originally assigned a public defender, but the public defender was much too busy with other case assignments to dedicate the kind of time Petitioner's complex mail fraud case would require to defend. Petitioner therefore chose the only remaining option available; self-representation.

Petitioner assisted by friends, scraped together the money to hire the co-counsel of his choice, Attorney Gary

Cantrell, to assist in his defense, but Attorney Cantrell "took the money and ran." The Court allowed him to do so by granting Attorney Cantrell's motion to withdraw, less than thirty days after counsel filed his entry of appearance and was paid $6,000.00.

The Court re-appointed a public defender as his "stand-by counsel" and denied Petitioner his counsel of choice by allowing co-counsel Cantrell to withdraw and take the money. With no remaining finances available, Petitioner was left with a stand-by public defender; forced to mount a defense to a complex mail fraud case without the desired assistance of his counsel and without access to a law library to prepare his defense, in violation of the Sixth Amendment.

D. Summary Of The Issues

Petitioner knowingly and intelligently made a choice to be hisown lead counsel, maintaining control of the manner in which his defense was conducted. "A criminal defendant has a constitutional right to conduct his own defense." Faretta v. California, 45 L Ed 2d 562 (1975). Petitioner had absolutely no intention of throwing his Sixth Amendment rights out the window with this choice, but rather sought the assistance of "co-counsel" of his choice to assist in presenting his defense and theories

to the jury at trial.

"[A]t trial, counsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of voir dire, examine and cross examine witnesses effectively (including the accused) object to improper prosecution questions and much more." Patterson v. Illinois, 101 L Ed 2d 261 277 n. 13 (1988); Cf., e.g., 1 Bench Books for United States District Court Judges 1.02-2 – 1.02-5 (3 ed 1986).

Petitioner did not seek an appointed government attorney to take over his complex case of alleged mail fraud because appointed counsel would not likely understand the circumstances surrounding the case or present Petitioner's theory of defense, on the basis of his good faith, to the jury at trial, as completely or as well as Petitioner believed he could do himself. Petitioner sought and paid for the co-counsel of his choice to assist him; APPENDIX "E" to the petition.

Nor did Petitioner knowingly or intelligently consent to the assistance of a court-appointed government lawyer in the capacity or stand by counsel; a lesser degree of assistance than Petitioner required and requested, in light of the circumstances as a whole, where NO LAW LIBRARY was available to Petitioner prior to or during the

trial; APPENDIX "F" to the petition.

Petitioner did seek to maintain control of and conduct his own defense in the capacity of lead counsel while maintaining the professional assistance of the co-counsel of his choice. The government alleged and the appeals court endorsed the position that once Petitioner opted to be his own lead counsel, he waived all the Sixth Amendment rights guaranteed by the Federal Constitution, which is a fundamentally flawed interpretation of the Sixth Amendment.

Moreover, Petitioner further sought to submit to the jury the fact that he was acting in "good faith" and genuinely believed he was operating his business in a lawful manner; his primary theory of defense. The trial judge's refusal to instruct the jury as to the defendant's primary defense theory which was supported by the facts and evidence as set forth above in Section C, Summary of the Facts to the petition deprived the jury of a potential and substantial reason to acquit Petitioner.

E. Standard of Review

On June 26, 2006, this Court held the erroneous

deprivation of a criminal defendant's choice of counsel: 1) violated the defendant's Sixth Amendment right, under the Federal Constitution, to counsel of choice and; 2) is not subject to harmless error analysis,

United States v. Gonzalez-Lopez, 165 L Ed 2d 409 (2006).

"An erroneous deprivation of the right to counsel of choice with consequences that were necessarily unquantifiable and indeterminate qualified as structural error in view of the difficulty of assessing the effect of the error, where, in light of the myriad aspects of representation, harmless error analysis in such a context would e a speculative inquiry into what might have occurred in an alternate universe." Id.

Just as the Court in U.S. v. Gaudin, 515 U.S. 506 (1995) found trial judge's refusal to allow jury to determine a question of materiality constituted reversible error, violating the Fifth Amendment's Due Process Clause and the Sixth Amendment's Right to Jury Trial, the Tenth Circuit in U.S. v. Wolny, 133 F.3d 758 (10th Cir. 1998) found reversible error where the trial judge refused to instruct the jury on the defendant's theory of defense.

"It is reversible error not to instruct the jury on a

theory of the defense that is supported by the evidence and the law." Id. at 765 (citing U.S. v. Scafe, 822 F.2d 928 932 (10th Cir. 1987)).

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE UNITED STATES TENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE AUTHORITATIVE HOLDINGS OF THIS COURT, WITH PRIOR DECISIONS OF ITS OWN CIRCUIT, AND WITH THE HOLDINGS OF MULTIPLE OTHER CIRCUITS REGARDING THE ISSUES IN THIS CASE.

This Court in Wheat v. U.S., 486 U.S. 153 159 (1988) held that an element of a defendant's right to have the assistance of counsel is the right of a defendant who does not require appointed counsel to choose who will represent him. In Powell v. Alabama, 287 U.S. 45 53 (1932) the Court stated, "it is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."

Petitioner, after having been appointed a government lawyer, chose to maintain a higher level of control over his own defense, requested appointed counsel resign, requested self representation and further hired and

paid for his own co-counsel of choice.

The government alleges an "all or nothing" approach to the Sixth Amendment arguing that Petitioner waived his Sixth Amendment right in their entirety by opting for self-representation. However, Petitioner desired a particular degree of assistance of counsel, which was co-counsel to assist in defense preparation. The appeals court effectively sanctioned the "all or nothing" theory when it affirmed the judgment. The government, and the Tenth Circuit, erroneously contends that a defendant must either accept the government appointed lawyer or forfeit his Sixth Amendment rights in their entirety.

The district court denied Petitioner his counsel of choice, as articulated by this Court in Gonzalez-Lopez (supra) when it allowed Petitioner's paid co-counsel of choice to resign, and substituted a
government appointed stand by counsel, over Petitioner's objections.

In Gonzalez-Lopez, the government contended a Sixth Amendment violation is not "complete" unless the defendant can show that substitute counsel was ineffective within the meaning of Strickland v. Washington, 466 U.S. 668 i.e., that substitute counsel's performance was deficient

and the defendant was prejudiced by it on in the alternative, a reasonable probability that, the result of the proceedings would have been different. Id. at 417.

This Court specifically rejected the government's contention, and the proposed alternative stating, "The right to select counsel of one's own choice, by contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trail. It has been regarded as the root meaning of then constitutional guarantee. Where the right to be assisted by counsel of one's own choice it wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation.

Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants [as here], regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice, which is the right to a particular lawyer regardless of comparative effectiveness, with the right to effective counsel, which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed."

Gonzalez-Lopez, at 419. (Internal citations omitted).

The Court's analysis fits squarely here, where deprivation of the right is complete when Petitioner was erroneously prevented from being represented by the lawyer he wanted and had paid and was forced to accept the government's lawyer as stand by counsel over Petitioner's objections.

The Gonzalez-Lopez, Court went on to find the error, which is precisely the same error as in the instant case, was not subject to harmless error analysis, but because the errors occurred during presentation of the case to the jury [as here] and their effect could not be quantitatively assessed in the context of other evidence presented in order to determine whether they were "harmless beyond a reasonable doubt," the errors were rather "structural errors" requiring automatic reversal, as defined by the Court in Sullivan v. Louisiana, 508 U.S. 275 (1993).

"An accused has a fundamental right to be represented by counsel of his own choice." Powell v. Alabama, 287 U.S. 45 (1932). "The Sixth Amendment encompasses broad guarantees of four rights: 1)...2)...3)...& 4) The right to be represented by counsel of one's own choice." U.S. v. Padilla-Martinez, 762 F.2d

942 (11th Cir. 1985) (Citing Glasser v. U.S., 315 U.S. 60 70 (1942). "Denial of right of counsel of choice is reversible error, regardless of whether prejudice is shown." Bland v. Calif. D.O.C., 20 F.3d 1469 (9th Cir. 1994).

It has been recognized that an indigent defendant in a criminal trial has a constitutional right to the assistance of appointed counsel. See Gideon v. Wainwright, 9 L Ed 2d 799 (1963). The defendant, however, should not be compelled to accept the assignment of counsel by the government when said counsel not of his choice or even in the capacity of his choice. "[T]o force a lawyer on a defendant can only lead him to believe that the law contrives against him." Faretta, supra at 581.

As Justice Frankfurter eloquently put it for the Court in Adams v. U.S. ex rel. McCann, 87 L Ed 268 (1942), to require the acceptance of counsel "is to imprison a man in his privileges and call if the Constitution." Id. at 280. See also Justice Scalia's concurrence in Martinez v. Court of App. of Cal., 145 L Ed 2d 597 609 (2000), "I have no doubt that the framers of our Constitution would not have found acceptable the compulsory assignment of counsel by the government to plead a criminal defendant's case."

The Tenth Circuit's decision, with regard to the denied jury instruction, conflicts with its own prior decisions. See U.S. v. Wolny, 133 F.3d 758 (10th Cir. 1998) (Finding reversible error in refusal to instruct jury on theory of defense that is supported by the evidence and law.) Petitioner's defense theory was supported by the evidence set forth in the above Section C, Summary of the facts, and supported by the law as set forth in this Section of the petition. See also U.S. v. Scafe, 822 F.2d 928 932 (10th Cir. 1987) (A defendant is entitled to jury instruction on any theory of defense finding support in the evidence and the law.)

The Tenth Circuit's decision, with regard to the denied jury instruction, conflicts with the decisions of other U.S. Circuit Courts of Appeal. See U.S. v. Barnett, 197 F.3d 138 (5th Cir. 1999) (It is reversible error to refuse a charge on a defense theory for which there is an evidentiary foundation and which, if believed by the jury, would be legally sufficient to support a verdict of not guilty.) If Petitioner's good faith defense theory, which clearly had an evidentiary foundation as set forth above, and been believed by the jury it would have been legally

sufficient to support a verdict of not guilty in the instant case.

See also U.S. v. Ansaldi, 372 F.3d 118 (6th Cir. 2004) (A criminal defendant is entitled to a jury instruction on any defense for which there is a foundation in the evidence.) Cf. U.S. v. Ford, 184 F.3d 566 (6th Cir. 1999) (A court should refuse a jury instruction if no evidence supports it, but even weak evidence will suffice.)

See also U.S. v. Smith, 223 F.3d 554 (7th 223 F.3d 554 (7th Cir. 2000) (Reversal is proper where the jury instructions inaccurately state the law or fail to present a theory of defense supported by the evidence.) Cf. U.S. v. Douglas, 818 F.2d 1317 1321 (7th Cir. 1987) (We hold that a defendant is entitled to an instruction on his or her theory of defense if; the defendant proposes a correct statement of law; the defendant's theory is supported by the evidence; the defendant's theory of defense is not part of the charge; and the failure to include an instruction on the defendant's theory of defense in the jury charge would deny the defendant a fair trial.)

Cf. U.S. v. Walker, 720 F.2d 1527 1541 (11th Cir. 1983) (Discussing when failure to instruct constitutes

reversible error.) Clearly, the Tenth Circuit's decision in the case at bar conflicts with this Court's authoritative holdings above, with the prior decisions of its own circuit, and with decisions of other circuit courts of appeal. The Tenth Circuit erred in finding Petitioner's defense theory was not supported by the evidence as set forth in Section C, Summary of Facts to the petition.

II THE ISSUES ARE STARKLY PRESENTED BY THE PRESENT CASE.

The district court held multiple hearings and considered multiple motions related to Petitioner's appointed of counsel, request for self representation, appointment of co-counsel, change in the capacity of Petitioner's appointed counsel from co-counsel to stand by counsel, appearance of hired and preferred co-counsel, withdrawal of co-counsel and reappointment of stand by counsel.

The record clearly reflects Petitioner's objections to his hired counsel being allowed to withdraw and a stand by government lawyer's subsequent reappointment. Petitioner's appeal brief discussed this issue thoroughly in both the opening brief and in the petition for en banc rehearing. Issue 1 is, therefore, starkly presented in this

case.

Petitioner timely requested a good faith jury instruction. The evidence and controlling case law supported giving the good faith jury instruction. The trial court committed reversible error in refusing to give a good faith defense instruction thereby denying Petitioner a fair trial and keeping from the jury a substantial reason to acquit Petitioner.

This issue was properly objected to at trial, evidence of which is supported by the record. This issue was presented to the appeals court in the form of a supplemental issue/brief and included in the petition for en banc rehearing. Issue 2 is, therefore, starkly presented in this case.

III THE QUESTIONS AND ISSUES PRESENTED ARE RECURRING ISSUES OF SUBSTANTIAL NATIONAL IMPORTANCE.

Both questions presented in this petition are at issue and recur daily in district courts across the nation. Virtually all jury trials involve the Sixth Amendment right to counsel, the right to a fair trial and a defendant's entitlement to a jury instruction

on his theory of defense, where the theory is supported by the evidence. Federal questions related to the Sixth

Amendment, as here, are clearly of substantial importance because the Sixth Amendment is fundamental to ALL judicial proceedings in the United States affecting all defendants who go to trial in all districts and in all appellate circuits across the land.

IV. THE DECISION OF THE UNITED STATES TENTH CIRCUIT COURT OF APPEALS IS INCORRECT IN THIS CASE.

The three judge panel that issued the opinion in the case at bar was: TACHA, HOLLOWAY and HARTZ, Circuit Judges, the opinion was written by HARTZ, Circuit Judge. The panel fatally misconstrued Petitioner's contentions in multiple parts of the opinion and is therefore incorrect.

Right to Counsel of Choice

The panel's opinion APPENDIX "A" set forth that Petitioner did argue his right to co-counsel. The panel misconstrued and misstated appellate counsel's concession during oral arguments finding: "at oral argument, however, Mr. Chavis's attorney conceded that Mr. Chavis had no such right." Id. at p 7.

The panel then cited cases about "hybrid representation" finding no Sixth Amendment right to

hybrid representation. Id. The error is that Petitioner or appellate counsel never argued a right to hybrid representation. Appellate counsel's concession was that he did not. The issue of Petitioner's right to co-counsel of his choice was the accurate contention and no concession thereby occurred. The misconstruance of Petitioner's contention and the erroneous opinion deriving thereof, was discussed at length in the denied petition for en banc rehearing.

The opinion further and erroneously states "Apparently what Mr. Chavis is suggesting is that (1) Mr. Cantrell had exceeded the limits of co-counsel's permissible exercise of authority in the case, so that Mr. Chavis had in essence relinquished his pro se representation; (2) the withdrawal of Mr. Cantrell therefore left Mr. Chavis without counsel; and (3) the Court thus violated Mr. Chavis's right to counsel by allowing Mr. Cantrell to withdraw. This is an interesting argument in theory, but the first premise lacks factual support." (emphasis added) Id. at p 8.

Of course the first premise lacks factual support because, factually, this is an inaccurate construance of Petitioner's first premise. By misconstruing the contention, which is actually and factually the deprivation of

Petitioner's right to co-counsel of his choice, the panel naturally found the inaccurate premise lacked factual support. It is unknown where the panel came up with the imaginary "Cantrell exceeded his limits" premise because it certainly was not before the Court.

Apparently what the panel is suggesting is that once a defendant chooses to invoke his well recognized right to self representation, he (1) should no longer be afforded the protections of the Sixth Amendment; (2) has no further say in choosing a particular hired lawyer to assist in his defense; (3) has no say in the capacity of assistance he requires, i.e. co-counsel, stand by counsel, etc. and (4) must accept any government lawyer the Court chooses to appoint and in any capacity. The panel's decision is incorrect and in conflict with the holdings of this Court.

Good Faith Instruction

Circuit precedent on the issue of entitlement to a good faith instruction dictates that a defendant is not guilty of mail fraud if he "in good faith believed that the plan would succeed, that the promises made would be kept and the representations carried out." U.S. v. Hopkins, 744 F.2d 716 718 (10th Cir. 1984) (en banc). At trial, Petitioner requested, but was denied, a good faith instruction; APPENDIX "G" to the petition.

Petitioner's good faith defense was supported by voluminous testimony from multiple witnesses; APPENDIX "D" to the petition.

Where a defense theory is supported by the law and by some evidence, as here a defendant is entitled to a good faith instruction in the Tenth Circuit. The trial court erred in finding the evidence did not support the requested good faith instruction. The Tenth Circuit erred in affirming the judgment,the opinion is incorrect and reversible error occurred.

I certify under the penalty of perjury that the statements contained herein are true and correct to the best of my knowledge and belief. Executed on this 3rd day of January, 2007.

CONCLUSION / PRAYER

FOR THESE REASONS, Petitioner prays this Honorable Court will grant discretionary review of the petition for writ of certiorari. May it be so Ordered.

Respectfully,

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